Finally, a "meeting competition" defense will not only enhance competition in MDUs, it will also avoid needless controversies where the cable operator simply matches the price of a competitor. As such, it minimizes administrative burdens and conserves valuable resources of the Commission, cable operators, and alternative MVPDs, consistent with the goals of the 1996 Act and the 1992 Cable Act.[52]

B. The Commission Should Establish a Uniform Definition of "Multiple Dwelling Units" for Purposes of Section 623(d) and the Expanded Private Cable Exemption.

The Notice proposes to conform the definition of "multiple dwelling units" for purposes of Section 623(d) to the 1996 Act's expansion of a "private cable system," i.e., "all facilities located wholly on private property, without regard to the nature or common ownership of the property served."[53]

TCI supports this proposal. However, an "expansion" of the definition of multiple dwelling units for purposes Section 623(d) may not be required given the Commission's current definition of this term in the uniform rate structure context. For purposes of

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[52] See 47 U.S.C. § 543(b)(2)(A)(Commission rate regulations must "seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission"); 47 U.S.C. § 521(6)(Commission must "minimize unnecessary regulation that would impose an undue economic burden on cable systems").

[53] Notice at ¶ 99. See also 47 U.S.C. § 522(7)(B).

Section 623(d), the Commission has defined multiple dwelling units as "apartment buildings, hotels, condominium associations, hospitals, universities, and trailer parks."[54] Thus, it appears as though the expansion of the definition of multiple dwelling units proposed in the Notice is already encompassed by current Commission rules.

Assuming arguendo that this is not the case, TCI supports such an expansion of the definition of multiple dwelling units for purposes of Section 623(d) to correspond to the expanded private cable exemption. The Commission is correct in thinking of these two provisions as symbiotic. The expanded private cable exemption will allow SMATVs and other cable competitors to serve MDUs more easily, thus providing even greater competition to cable operators in the MDU context. As noted, Congress amended Section 623(d) to allow cable operators to deviate from their uniform rate structure in order to respond to competition in multiple dwelling units.[55] To ensure that Congress' intent with respect to both of these provisions is fully realized, the definition of MDU should be the same.

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[54] Rate Order, 8 F.C.C.R. 5631, at ¶ 423.

[55] See House Report at 109.

In fact, the legislative history of Section 623(d) indicates that Congress contemplated such a uniform definition of MDU:

> The Committee finds that this regulation does not serve consumers well by effectively prohibiting cable operators from offering lower prices in an MDU even where there is another distributor offering the same video programming in that MDU.[56]

Any other approach would skew the competitive landscape in the MDU marketplace. For example, given that SMATVs are now free of all regulation in planned developments, if a narrower definition of MDUs under Section 623(d) were to prevent cable operators from responding to SMATV competition in such developments, Congress' desire to increase competition in the MDU marketplace will have been frustrated.

IV. THE COMMISSION SHOULD REQUIRE THAT SUBSCRIBERS USE FCC FORM 329 IN FILING CPST COMPLAINTS WITH LFAS.

In its prior experience with CPST complaints, the Commission found that subscribers often filed improper rate complaints (e.g., complaints about basic tier rates, premium or pay-per-program services, additional outlet charges, cable equipment rates, and other deficiencies.[57] Other complaints were vague,

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[56] Id. (first emphasis in original, second emphasis added).

[57] See, e.g., Motions To Dismiss Complaints Concerning Cable Services Rates, 10 F.C.C.R. 8518 (1995) (dismissing CPST rate complaints because they concerned additional outlet charges, complained of basic tier rates, were untimely, or were not filed by a subscriber).

informal, and lacked specific information that would allow the Commission to determined whether the complaint was valid. FCC Form 329 has played an important role in identifying those valid complaints over which the Commission has jurisdiction. Commission review of the completed FCC Form 329 complaints has resulted in the dismissal of subscriber complaints from over 253 franchises due to a lack of jurisdiction.[58] Without the information provided by FCC Form 329, it would have been much more difficult for the LFA, the Commission, and the cable operator to ascertain the true nature of the complaints.

The Commission should continue to require subscribers to file an FCC Form 329 with the LFA. Clearly, the types of improper and invalid complaints that were filed directly by subscribers under the old regime and which were rejected by the Commission should not be able to form the basis of an LFA determination to file a CPST complaint with the Commission. Moreover, it is insufficient for the Commission to rely on LFA

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[58] The 253 figure was obtained by calculating the number of franchises for which a properly completed FCC Form 329 was accepted by the Commission but later dismissed by a Commission order. In all such cases, Commission review of the completed FCC Form 329 revealed that the Commission does not have jurisdiction over the subscriber complaint. In addition, thousands of FCC Form 329 complaints were dismissed as unacceptable for filing by the Commission's contracting service. Undoubtedly, many of these dismissals were because the rejected complaints did not concern CPST rates.

"regular business practices" to ensure that the complaints received by the LFA from subscribers are valid and serve as a proper jurisdictional predicate for the LFA to file a complaint with the Commission.[59] While some LFAs would undoubtedly do a good job of ensuring that subscriber complaints were written, specific, and concerned the operator's CPST rates, other LFAs would not. The Commission, which is obligated by Section 623(c)(1)(B) of the Communications Act to prescribe fair and expeditious procedures regarding CPST complaints, should (as it did in the prior regulatory regime) create a uniform set of procedures for the filing of such complaints with the LFA. The key component to such uniformity is use of the FCC Form 329.

V. TECHNICAL STANDARDS

A. The Amendments to Section 624(e) Create A Broad Prohibition On Any State or LFA Regulation of Cable Equipment or Transmission Technologies.

Congress deleted the language in Section 624 of the Act which previously allowed LFAs to require compliance with federal technical standards (or, upon Commission approval, impose higher

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[59] See Notice at ¶ 21.

technical standards) as a condition of a franchise. This language was replaced with the following provision:

> No state or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology.[60]

These amendments fundamentally altered the role of local authorities by imposing a strict ban on LFA or state involvement in an operator's technical decisions. Indeed, in amending Section 624, Congress stated that it was flatly "prohibiting States or franchising authorities from regulating in the areas of technical standards, customer equipment, and transmission technologies."[61]

This does not mean that LFAs have no ability to require upgrades of cable systems. To the contrary, LFAs can require upgrades if such upgrades are necessary to meet future cable-related needs taking into account costs, and if there is a demonstrated demand for such upgrades. They are simply prohibited from dictating that such upgrades be completed using any particular equipment or transmission technology.

Congress' policy judgment under Section 624(e) reflects its recognition that "investment in and deployment of existing and

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[60] 47 U.S.C. § 544(e).

[61] House Report at 110 (emphasis added).

future advanced, multipurpose technologies will best be fostered by minimizing government limitations on the commercial use of those technologies."[62] Thus, it consciously removed all state and local authority to dictate a cable operator's technical decisions as part of the 1996 Act's "national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies."[63]

As Congress was no doubt aware, LFAs currently use the franchising and renewal process to impose intrusive restrictions on cable operators by specifying detailed technical standards for any rebuild or upgrade of the cable system. Restrictions and standards commonly include: (1) channel capacity requirements of a specific MHz level; (2) requirements as to the number of optical fibers a cable operator must deploy; (3) the number of homes each fiber optic node may serve; (4) the number of amplifiers in each cascade; and (5) the amount of stand-by power at the headend. Such detailed franchise requirements are precisely the type of local "regulation of ... transmission technologies" which Section 624(e) now prohibits:

> The Committee intends by this subsection to avoid the effects of disjointed local regulation. The Committee

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[62] S. 652, 104th Cong., 1st Sess. § 5(13)(1995).

[63] Conference Report at 1 (emphasis added).

> finds that the patchwork of regulations that would result from the a locality-by-locality approach is particularly inappropriate in today's intensely dynamic technological environment.[64]

Moreover, because prohibiting myriad, inconsistent local regulations is critical to technology development, the broad preemption under Section 624(e) is consistent with numerous recent decisions in which the Commission itself has attempted to foster the advancement of a national, broadband telecommunications infrastructure.[65]

B. Any Power To Regulate Facilities or Equipment Previously Granted By Sections 621 or 626 of the Act is Preempted By the Amendment to Section 624(e).

Any power to regulate cable operators' equipment and transmission technologies previously granted by Sections 621 and 626 is subordinate to the broad prohibition on such regulation

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64 House Report at 110.

65 See Going-Forward Order, 10 F.C.C.R. 1226, at ¶ 1 (1995) (modifying the Commission's rate regulations in order to provide "additional incentives to expand ... facilities"); Social Contract for Time Warner Cable, 11 F.C.C.R. 2788 (1995)(allowing rate relief for the purpose of promoting substantial system upgrades); Social Contract for Continental Cablevision, 11 F.C.C.R. 299 (1995)(fostering system upgrades by agreeing to less restrictive regulatory treatment). See also OMB Approves FCC Form 1235 Abbreviated Cost of Service Filing For Network Upgrades, Public Notice, Report No. CS 96-11 (released February 27, 1996)(facilitating cable infrastructure development by providing a simplified method of cost recovery); Thirteenth Order on Reconsideration, 11 F.C.C.R. 388 (1995)(allowing for annual rate increases to, among other things, promote more infrastructure investment).

contained in amended Section 624(e). Indeed, as the Notice indicates,[66] Section 626 expressly provides that an LFA's regulation in the context of renewal is "subject to Section 624."[67] Although Sections 626 and 621 allow LFA's to consider a cable operator's signal quality and technical qualifications as part of the franchising and renewal process, neither of these provisions has ever been interpreted as granting LFAs an independent right to impose technical standards and requirements or otherwise regulate a cable operator's services and facilities. Rather, both the Commission and the federal courts have held that these franchising powers only allow LFAs to consider technical performance to the extent permitted by Section 624.[68] Section 624(e) now prohibits LFA regulation of cable equipment, facilities, and transmission technologies.

A failure on the part of the Commission to recognize the effect of the Section 624 amendments on LFAs' franchising and renewal powers under Sections 621 and 626 would essentially nullify the amendment to Section 624(e). As noted above, the

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66 See Notice at ¶ 104.

67 47 U.S.C. § 546(b)(2).

68 See, e.g., City of New York v. F.C.C., 814 F.2d 720 (D.C. Cir. 1987), aff'd. 486 U.S. 57 (1988)(agreeing that the franchise powers of Sections 621 and 626 only allowed the LFAs to enforce federal technical standards to the extent permitted by 624).

franchising and renewal process is one of the primary means LFAs use to impose technical restrictions on a cable operator's use of equipment and transmission technologies. If Section 624(e) does not prohibit this LFA practice, it becomes superfluous; any LFA could simply evade the federal requirements by imposing technical regulations or restrictions on subscriber equipment or transmission technologies as part of the grant, renewal, or transfer of a franchise.[69] Such a result patently contradicts Congress' intent to promote the national implementation of advanced technology by creating the Section 624(e) prohibitions.

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[69] Of course, the Commission cannot read Section 624(e) in a manner that renders it meaningless. See Consolidated Rail Corp. v. United States, 896 F. 2d 574, 579 (D.C. Cir. 1990)("effect must be given, if possible, to every word, clause and sentence of a statute ... so that no part will be inoperative or superfluous, void or insignificant.")(citation omitted). See also Natural Resources Defense Council v. U.S., 822 F. 2d 104, 113 (D.C. Cir. 1987)(It is "illegitimate for the judiciary [or agencies] ... to tear asunder a specific provision which Congress saw fit to enact."); Avco Corp. v. Department of Justice, 884 F. 2d 621, 625-26 (D.C. Cir. 1989)("[A]ppellees' theory of statutory interpretation would allow courts to read out of a statute an unambiguous phrase .... This is, in our view, a unique principle of statutory construction, and one we cannot embrace.").

CONCLUSION

For the foregoing reasons, TCI respectfully urges the Commission to implement the Cable Act reform provisions of the 1996 Act consistent with the comments herein.

Respectfully submitted,

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